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# IN THE HIGH COURT OF DELHI AT NEW DELHI

**Judgment reserved on : 19th October, 2006**
**Date of decision : 6th December, 2006**

**RFA No. 221/2002**

M/S. KHANNA ENGG. CORPORATION ... Appellant
Through : Mr. G.L. Rawal, Sr. Advocate with
Mr. Parveen Rawal, Advocate.

VERSUS

M/S. ALESCO STEELS ...Respondent
Through : Ms. Rama Praveen Siddiqui and
Mr. Saud Ahmed, Advocates.

CORAM:
**HON'BLE MR. JUSTICE T.S. THAKUR**
**HON'BLE MR. JUSTICE S.L. BHAYANA**

1. Whether reporters of local paper may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be referred in the Digest?

} Yes

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S.L. BHAYANA, J.

1. This appeal arises out of the order passed by the learned Additional District Judge, Delhi dated 12.12.2001 whereby the court has dismissed the suit of the plaintiff/appellant.

2. The brief facts as set out in the plaint are that the plaintiff/appellant is a proprietorship concern and Mr. Rajender Kumar Khanna is the sole proprietor of the appellant firm. The defendants had approached the plaintiff firm and requested them to supply iron scrap. The defendants also assured the plaintiff that they will make the payment within 30 days of the receipt of delivery of the goods. The plaintiff supplied iron scrap weighing 10.450 MT against bill No.3722 dated 24.01.1996 in the sum of Rs.67,151.70. The iron scrap was duly received by the defendants. As per terms of the invoice/bill, the defendants were under obligation to make the payment within one month of the receipt of the goods and in default of the payment, the defendants are liable to pay interest @ 21% on the bill amount. Even after receipt of the goods, the defendants failed to make the payment within the stipulated period. Several requests were made by the plaintiff to the

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defendants to make the payment but the defendants did not make the payment. The plaintiff also served legal notices dated 09.01.1997 and 05.05.1998 through their advocates upon the defendants asking them to make payment of the suit amount along with interest but despite receipt of these legal notices, the defendant failed to make the payment. The plaintiff filed the suit for recovery of Rs.67,151.70 with interest @ 21% per annum from 24.01.1996 to 23.01.1999 which comes to Rs.42,305.30. The total amount claimed by the plaintiff from the defendant is Rs.1,09,457/- together with future and pendente lite interest @ 21% per annum.

3. In the written statement filed by the defendants, they have taken preliminary objection that the goods were never supplied by the plaintiff to them and that the plaintiff had failed to place on record the receipt of *dharam kanta*, challan, receipt of goods, etc and, therefore, the suit was liable to be dismissed under Order 6 Rule 5 of the Code of Civil Procedure. The defendants also took the plea that the suit is barred by limitation. On merits, the defendants submitted that the suit had not been filed by a duly authorised person hence, the same was liable to be dismissed. The defendants had never approached the plaintiff for supply

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of iron scrap and no such order was placed upon the plaintiff nor the defendants promised to pay the amount within one month of delivery of the goods. The plaintiff filed a replication to the written statement filed by the defendants, reiterated their stand and denied all the allegations made by the defendants in their written statement. On the pleadings of the parties, the learned trial court framed the following issues :-

1. Whether the suit has not been signed, verified and filed by an authorised person? OPD.
2. Whether no actual transaction has taken place between the parties and it is only a matter of book entry. If so, what effect? OPD.
3.Whether the suit is barred by limitation?OPD.
4.Whether the plaintiff is entitled for the decree as claimed?OPP.
5.Whether the plaintiff is liable for the interest, if so, at what rate and for what period?OPP.
6.Relief.

4. The plaintiff examined three witnesses whereas the defendants examined only one witness in support of their case. After hearing arguments of both the parties, the trial court decided issue No.1 in favour of the plaintiff and against the defendants and held that the suit had been filed by a duly authorised person. The trial court dealt with

issues 2 and 4 together and recorded a finding that the plaintiff had not supplied any goods to the defendants and that the transaction between the parties was only a paper transaction. The plaintiff had not proved the delivery of the goods to the defendants and, therefore, the trial court decided issues No. 2 and 4 in favour of the defendants and against the plaintiff. The trial court decided issue No.3 in favour of the plaintiff and against the defendants and held that the suit is not barred by limitation. The trial court decided issue No.5 in favour of the defendants and against the plaintiff and has held that the question of payment of interest by the defendants to the plaintiff did not arise as the plaintiff was not entitled to any amount from the defendants. The trial court finally dismissed the suit of the plaintiff/appellant.

5. We have heard learned counsel for the parties and perused the record carefully. Learned counsel for the plaintiff submitted that the trial court erred in holding that no goods had been supplied by the plaintiff to the defendants. He drew our attention to the evidence of PW1 R.K. Khanna, proprietor of M/s. Khanna Engineering Corporation, the plaintiff firm. He has deposed on oath before the court that the defendant had entered into a deal with the plaintiff for the purchase of

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iron scrap and supply of iron scrap was made by the plaintiff to the defendants against invoice No.3722 which was raised on 24.01.1996 and the scrap was worth Rs.67,000/- was supplied to the defendant which includes sales tax and excise duty. The invoice is mark "A". The payment was to be made by the defendants within 30 days but the defendants failed to make the payment against the iron scrap supplied by the plaintiff to the defendant. Sales tax return challan is mark "B". Entry in the local sales tax account register is mark "C". Excise duty form RT-12 is marked "D" and "E" and the entry in the ledger is mark "F". They had also issued legal notice mark "G" to mark "I" to the defendants and their postal receipts are Ex.P1/1, Ex.P1/2 and Ex.P1/3. We have also gone through the cross examination of this witness. In the cross examination, he has stated that the plaintiff firm is registered with the Excise Department. He was not maintaining any gate pass. He was not making entry regarding the movement of goods from the factory. The goods were sent to the defendants by truck. No receipt for delivery of the goods was received from the defendants. His representative had accompanied the goods for weighing. His man has obtained the slip from the scale and the slip was given to the defendants. The truck

number is mentioned in the invoice through which the goods were transported. He further states that he has brought the photocopy of form RT-12. The original of the same has been sent to Excise Department. PW2 Balvir Singh, Inspector Central Excise, M.O.D. has deposed before the court that he has brought the summoned record i.e. RT-12 return pertaining to M/s. Alesco Steels for the month of January and February, 1999. As per his record, document known as modvatable invoice, photocopy of which is mark "A" and "B" was submitted to the Excise Department by M/s. Alesco Steels. The above documents are required for obtaining credit. Excise department had given the credit to M/s. Alesco Steels. In the cross examination, this witness has stated that the credit given to M/s. Alesco Steels was for Rs.3,135/- and Rs.11,400/-. Learned counsel for the appellant has submitted that as per two invoices against which the material was supplied to the respondent/defendants were submitted by the defendants in the Excise Department and they had been given credit by the Excise Department against those invoices which shows that the material was supplied against these invoices by the plaintiff to the respondent/defendants and even the defendants had taken credit of excise duty from the department by submitting the invoices

before the Excise Department. PW3 Raj Sardana has deposed before the court that he was a part time accountant with the plaintiff corporation. He has brought the relevant record i.e. invoice No.3722 Ex.PW3/A which was issued against the defendants M/s. Alesco Steels. He has also brought RG-23A, part II, excise register which shows duty modvat (excise) at serial No.60 dated 24.01.1996. He also brought RGI register (daily stock account) which shows the sales entry and the said register is also authenticated by the Central Excise Department. He has also brought the customer ledger and the entry is encircled at Ex.PW3/B which shows the modvat amount against M/s. Alesco Steels in respect of bill No.3722 dated 24.01.1996. We have also gone through the cross examination of this witness but nothing could be elicited in the cross examination of this witness which could impeach the credibility of this witness. Learned counsel for the appellant has submitted that the witnesses of the plaintiff have proved that the goods were supplied to the defendants against the above invoices and those invoices were submitted by the defendants with the Excise Department who also claimed modvat relief from Excise Department and that the trial court has wrongly dismissed the suit of the plaintiff and the suit of the plaintiff may

be decreed with costs.

6. On the other hand, learned counsel for the defendant/respondent submitted that the trial court has rightly dismissed the suit of the plaintiff as the plaintiff has failed to prove that the goods were supplied to the defendants against any invoices, however, counsel for the defendant has fairly conceded that the invoice against which the goods were supplied by the plaintiff to defendants was submitted by the defendants with the Excise Department and they have claimed modvat relief from the Excise Department. He has further stated that the order was only a book entry and actual supplies were not made by the plaintiff to the defendants and the appeal of the appellant may be dismissed.

7. We have gone through the deposition of the witnesses examined by the plaintiff as well as the defendants. PW1 R.K. Khanna, proprietor of the plaintiff firm has deposed before the court that the defendants had approached the plaintiff for supply of scrap and on their request, he supplied scrap material against invoice which was raised on 24.01.1996 bearing No.3722 and the material supplied was worth Rs.67,000/- which includes sales tax and excise duty. The invoice is mark "A". This witness has also proved sales tax return challan as mark

"B". Entry in the local sales tax account register is mark "C" and excise duty form RT-12 are marked "D" and "E". He has also proved the entry in the ledger which is mark "F". This witness further states that they had asked the defendants to make the payment for the material supplied to them but the defendants failed to make the payment. Consequently, they sent a legal notice to the defendant calling upon them to clear the payment against the supplies made to them. But despite legal notice, the defendants have failed to make the payments. We have also gone through the cross examination of this witness. In the cross examination, this witness has admitted that their firm is registered with the Excise Department. He has submitted that the scrap material was supplied in a truck. He does not remember the truck number orally but the truck number is mentioned in the invoice. He has also stated that his representative has accompanied the goods to the factory of the defendant.

8. We have also gone through the statement of PW2 Balvir Singh, Inspector Central Excise, M.O.D. He has stated that as per record RT-12 return pertains to M/s. Alesco Steels for the month of January and February, 1999. As per his record, document known as

modvatable invoice, photocopy of which is marked "A" and "B" is available in their record. These documents are required to be submitted with the Excise Department for obtaining credit. The Excise Department had given credit for the above invoices to M/s. Alesco Steels. From the deposition of this witness, it has become clear that the defendant M/s. Alesco Steels had submitted the invoice against which the scrap was supplied by the plaintiff to the defendants with the Excise Department for obtaining credit of the excise duty which was paid by the plaintiff on the material supplied and the defendants had obtained credit against these invoices against which the material was supplied by the plaintiff to the defendants. If the goods had not been supplied by the plaintiff to the defendants, then the invoice against which the goods have been supplied should not have been in the possession of the defendants at all and if these invoices had come into the hands of the defendants, it means that the material against these invoices had been supplied to them. Not only that, defendants had also taken credit on the excise duties against these very invoices against which the material was supplied by the plaintiff to the defendants. Having claimed credit on excise duty against these invoices, it does not lie in the mouth of the defendants to say that the

material was not supplied by the plaintiff to them. So, the stand taken by the defendants that no material has been supplied to them stands belies by the statement of above PWs.

9. We have also gone through the evidence of PW3 Raj Sardana. He has proved invoice No.3722 Ex.PW3/A which was issued to the defendant M/s. Alesco Steels by the plaintiff. He had also proved excise register RG-23A which shows the payment of excise duty to the department at serial No.60 dated 24.01.1996. He has also proved RGI register (daily stock account) which also shows the sales entries which have also been authenticated by the Excise Department. He has also proved the customer ledger in which there is an entry encircled at Ex.PW3/B which shows the debit amount in respect of the supplies made to M/s. Alesco Steels in respect of bill No.3722 dated 24.01.96. All these registers have been maintained in the ordinary course of business by this witness who was working in the plaintiff's firm. We have gone through all these documents which have been proved by this witness and we find all these documents to be genuine and authentic as these entries have been made in the registers of the plaintiff firm maintained in the ordinary course of business.

10. The defendants also examined one witness DW1 Om Prakash, proprietor of the defendants' company. He has deposed before the court that they had never placed any order of scrap upon the plaintiff at any time. No bill was given to them at any time. In the cross examination, he has stated that M/s. Alesco Steels came into existence in May, 1973. He does not know whether it is registered or not. He also does not know the names of its partners. He is a partner in M/s. Alesco Steels which used to work in iron and steel (scrap). He does not know whether it is registered under the Companies Act or with the Registrar of Companies. He does not know the account number of the defendants' company. He has no knowledge about the transactions of the firm. He has no knowledge if the company was keeping the register RG-23A, part II. He has denied the suggestion that he is not producing the registers to conceal the material facts before the Hon'ble Court. He does not know whether the plaintiff firm is availing the facility of modvat. He does not know whether M/s. Khanna Engineering Corporation has placed any bill and the same is Ex.PW3/A. He does not know if the defendants had produced the relevant record in the Excise Department and had filed the

RT-12 return. He has no knowledge if the record is available with the Excise Department. He has denied the suggestion that they agreed to pay interest @ 21% per annum if they fail to pay the amount against the said bill. After going through the statements of DW1, it has become clear that this witness does not know anything about the working of the company. He has shown his ignorance about the availing of the modvat facility from the Excise Department. He also does not know whether any RT-12 return was filed by the company before the Excise Department or not. He also does not know whether modvat against Ex.PW3/A was availed by them. So, from the evidence of this witness it has become clear that this witness does not know anything about the present transaction which the defendants' company had entered with the plaintiff company. So, this witness is of no help to the defendants.

11. Reference may in this connection be made to the decision of the Supreme Court in "Gopal Krishnaji Ketkar Versus Mohammed Haji Latif and others, **AIR 1968 SC 1413**" where the Apex Court declared that if a party, in possession of evidence which could throw light on controversy withholds the same, the court must draw adverse inference against him even if the onus of proof did not lie on him. The Court

observed :

> "Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

12. The witnesses examined by the plaintiff have clearly established their case beyond reasonable doubt that the goods were supplied by the plaintiff to the defendants against invoice i.e. bill No.3722 dated 24.01.1996 for a sum of Rs.67,151.70 but the defendants have failed to make the payment after having received the goods from the plaintiff company. We are satisfied that the plaintiff has successfully proved its case beyond reasonable doubt against the defendants. We also hold that the trial court has wrongly dismissed the suit of the plaintiff/appellant. Keeping in view the discussions made above, we allow this appeal. The suit of the plaintiff is decreed for a sum of

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Rs.1,09,457/- along with future and pendente lite interest @ 12% per annum till realisation. The appeal is allowed with costs.

(S.L.BHAYANA)
JUDGE

(T.S. THAKUR)
JUDGE

December 06, 2006
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